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No. 84-1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BERTOLD J. PEMBAUR,

Petitioner,

—v.—

CITY OF CINCINNATI, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES OF OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OHIO, AMICI CURIAE

The American Civil Liberties Union ("ACLU") and the ACLU of Ohio respectfully move for leave to file the within brief amici curiae. The petitioner has consented to the filing of this brief; the respondents have not.

The American Civil Liberties Union is a nationwide, nonpartisan organization of more

than 250,000 persons dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Ohio is one of its state affiliates.

The American Civil Liberties Union and its affiliates have long worked to defend basic constitutional rights and in so doing, have in recent years filed briefs, as counsel for a party or as amicus curiae, in many cases that required construction of 42 U.S.C. §1983, the statute at issue in this case. Accordingly, we move to file this brief amici curiae to bring that experience to bear on the important questions presented by this case.

Respectfully submitted,

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August 1, 1985

QUESTION PRESENTED

Whether the single, discrete decision of an elected County Prosecutor and elected County Sheriff authorizing subordinate police officials to force entry into petitioner's office constitutes the County's "official policy" for purposes of liability under the 42 U.S.C.§ 1983.

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STATEMENT OF THE CASE

The petitioner is a physician. In connection with a Grand Jury investigation of him, subpoenas were issued for the appearance of two of petitioner's employees. When they failed to appear as directed, a writ of attachment -- known in Ohio practice as a "capias" -- was issued for the arrest of each employee.

Although the capiases listed the employees' home addresses, two deputy sheriffs of Hamilton County, Ohio sought to execute service at the petitioner's office. The petitioner refused them permission to enter.

The deputy sheriffs then called their superiors for instructions. Ultimately, after consultations up the chain of command, the County Prosecutor and the County Sheriff authorized the deputy sheriffs to serve the

capias, even if forced entry into petitioner's office was necessary.[1]

The deputy sheriffs first attempted to batter down the door to petitioner's office and, when that failed, participated in chopping down the door with an axe.[2] The deputy sheriffs then entered the petitioner's office but the employees were not found.

The Petitioner brought suit against the County[3] alleging a violation of his constitutional rights. After a bench trial, the District Court dismissed the case in its entirety concluding, without significant analysis, that "Pembaur suffered no constitutional deprivation as a result of county policy or custom." 746 F2d at 340.[4]

The Court of Appeals affirmed the district court decision as to the County.[5] It concluded that the "single,

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[1] Upon being advised that petitioner would not voluntarily permit the deputies to search his office for the two witnesses, the Prosecutor Simon Leis ordered the deputies to "go in and get them." (R. 53-54, J.A. 23-25.)

[2] At the time of the forced entry into petitioner's office, the deputy sheriffs were accompanied and assisted by police officers of the City of Cincinatti. The Court of Appeals held that those City police officers were acting pursuant to longstanding City policy authorizing the use of force, including forced entry, to serve a capias. 746 F.2d 337, 341 (6th Cir. 1984). The city did not seek review of that decision in this Court. Therefore the petitioner's claims against the City are not at issue here.

[3] Footnote on next page.

[3] The petitioner also named other governmental entities and individual officials as defendants. See the description of the case in the decision below, 746 F.2d at 339. Those claims are not relevant to the Monell liability of the County at issue here.

[4] The District Court also held that the County was not responsible for the Sheriff's acts because the Sheriff was not subject to the control of the County Board of Commissioners. The Court of Appeals reversed that aspect of the district court decision, 746 F.2d at 341, and no further review of that issue has been sought.

[5] However, the court reversed as to the petitioner's claim against the City because of testimony by the Chief of Police "that the policy and past practice of his department was to use whatever force was necessary including forcible entry to serve a capias." 746 F.2d at 337.

discrete decision [to force entry into petitioner's office] is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." Id. at 341.

The issue before this Court is whether the order of the County Prosecutor and Sheriff, directing the forcible entry into petitioner's office, constituted the County's "official policy" for purposes of Monell liability.

SUMMARY OF ARGUMENT

It is now well established that a municipality may be liable under 42 U.S.C. §1983. Monell v. Department of Social Services, 436 U.S. 658 (1978). However, the municipality is not subject to suit merely on a theory of respondeat superior, but rather

only when the unconstitutional act in question was caused by the government's own policy or custom. This case raises the question of whether a single act, implementing an order by County policymaking officials, is sufficient to constitute the County's "official policy" for purposes of Monell liability. Amici contend that it is.

A "policy" is not determined by the number of times it is implemented, but rather by the authority of its source. In this case, the County Prosecutor and the County Sheriff ordered police officials forcibly to enter the petitioner's office in order to serve writs of attachment, not on the petitioner himself but on two of his employees. That order, and the forcible entry it caused, was clearly unconstitutional. And the County is properly held responsible for the consequences of that order because it was given by policymaking

officials, acting within the scope of their policymaking authority and represents the governmental choice of the very authorities empowered by state law to make it.

The fact that the petitioner's case may have been the first time that policy was implemented, is entirely irrelevant. If a policy existed, then the municipality is subject to Monell liability any time -- even the first time -- that policy is the cause of a constitutional violation.

To hold otherwise would permit the municipality a "free" constitutional violation, surely an unacceptable result. Moreover, narrowing municipal liability so as to preclude recovery for the first offense, would seriously undermine the important purposes of §1983 liability: compensating the victim and deterring constitutional wrongdoing.

ARGUMENT

THE SINGLE DISCRETE DECISION BY AN ELECTED COUNTY PROSECUTOR AND AN ELECTED COUNTY SHERIFF AUTHORIZING SUBORDINATE POLICE OFFICIALS TO FORCE ENTRY INTO PETITIONER'S OFFICE CONSTITUTES THE COUNTY'S "OFFICIAL POLICY" FOR PURPOSES OF LIABILITY UNDER 42 U.S.C. §1983.

In Monell v. Department of Social Services, 436 U.S. 658 (1978), this Court held that a municipality can be liable under 42 U.S.C. §1983 for a constitutional injury caused by a "government policy or custom." Id. at 694. Because Monell "unquestionably involve[d] official policy as to the moving force of the constitutional violation," id. at 695, the Court "left for another day" the task of defining the necessary ingredients of a policy or custom under §1983. This case presents the question reserved in Monell in a context never before squarely addressed.

Here, the act in question -- axing down a doctor's office door so as to effect service of process on his employees, who were

not even known to be there -- was concededly unconstitutional.[6] Furthermore, there is no dispute that the unconstitutional entry was done on the authority of the highest law enforcement officials of the County: the County Prosecutor and the County Sheriff. Thus, their orders can be fairly said to have caused the forced entry -- they were "the moving force of the constitutional violation." Polk County v. Dodson, 454 U.S. 312, 326 (1981).

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[6] Relying on Steagald v. United States, 451 U.S. 204 (1981) the Court of Appeals below held that

> "... it is clear that autorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrant." 746 F.2d, at 340, n.1.

The respondent has not sought review of that holding, and must be deemed bound by it, at least for purposes of determining Monell liability.

The only remaining question, therefore, is whether that order of the County Prosecutor and Sheriff -- directing the deputy sheriffs to break down the door of petitioner's office -- constituted the "official policy" of the County. Amici urge the Court to conclude that it did, notwithstanding that it may have been the first time that policy was given effect.

A. The Determination Of "Official Policy" Looks To The Authority Of Its Source, Not The Frequency Of Its Application.

1. The Power to Establish Official Policy

This Court has recognized that an official government policy may take many forms. Monell, supra at 694-95. Obviously, official policy may be a formal rule of a municipality's executive authorties, as in Monell itself. It may also be a promulgation of a municipal legislative body. See Owen v.

City of Independence, 445 U.S. 622 (1980); Newport v. Fact Concerts, Inc., 453 U.S.247 (1981). However, Monell also recognized that, for purposes of §1983 liability, a "policy" need not be a formal, written act of the municipality: policy may be "made by [a municipality's] lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694.

In each case the critical question is whether the action in question was "taken by the city, as opposed to an action taken unilaterally by a nonpolicymaking municipal employee." Oklahoma City v Tuttle, 53 U.S.L.W. 4639, 4645 (June 3, 1985) (Brennan, J., concurring). Where the act is by a nonpolicymaking employee, and where it is unilateral -- that is, not compelled by higher municipal authority -- then the government cannot be said to have acted, for purposes of Monell liability. Such was the

rationale for the Court's decision in Tuttle. Conversely, however, when a policymaking official, functioning within the scope of that official's policymaking authority, orders that an act be done, it necessarily becomes the offical policy of the government.

In this case, the unconstitutional act was ordered by the County Prosecutor and the County Sheriff. Each is an elected official of the County. Ohio Rev. Code Ann. §§ 309.01 (Prosecutor) and 311.01 (Sheriff). The Sheriff is the "chief law enforcement officer of the county," 1962 Op. Attorney General No. 3109, and the Prosecutor is the "legal advisor" for all county officers, Ohio Rev. Code Ann. § 309.09, which includes deputy sheriffs. The Prosecutor also has statutory responsibility for inquiry into crimes and

prosecuting complaints. Id. at § 309.08.[7]

Not surprisingly, the court of appeals recognized that both the Prosecutor and the Sheriff were officials of such authority and rank in the County government to establish "offical policy in a proper case." 746 F2d, at 341, and n.3. The only reason the court concluded that official policy was not established in this case was that the order to forcibly enter the petitioner's office was "a single, discrete decision." Id.

2. Frequency of Application Is Not Determinative of Official Policy

In determining whether an official's action is government policy, the number of times that official has repeated the act is clearly irrelevent. Of course, a history of prior action, or inaction, may be evidence of

[7] Further descriptions of the policymaking powers of these Couty officials appears in the decision below, 746 F.2d at 340.

the existence of a policy, if that is in dispute; just as such a history evidences a government "custom," for purposes of Monell liability. But whereas a custom, by definition, depends on that history, a policy becomes effective when ordered, and applies the first time it is implemented as well as every time thereafter until it is changed. Thus, the difference between a "policy" and a "custom" is that the former is determined by the authority of the promulgation rather than the frequency of its application, whereas a custom achieves authority by the pattern of its application (or inapplication). See e.g., Monell, supra at 690-91.

Indeed, both the plurality and concurring opinions in Tuttle recognized that even a single, discrete act implementing an official policy may be sufficient to

establish Monell liability.[8]

> "Obviously, it requires only one application of a policy... to satisfy fully Monell's requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.
>
> "...To establish the constitutional violation in Monell no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise." 53 U.S.L.W. at 4643 (Rehnquist, J.).

See also, Id. at 4645 (Brennen J., concurring). The Court of Appeals decision to the contrary is wrong as a matter of law, and does not make good sense.

Even though this case may have arisen in connection with the first implementation of

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[8] Furthermore, although not specifically addressing the issue, two decisions of this Court have involved claims arising from the first-time implementation of policy by a municipality's ploicymakers. See Owen v. City of Independence, supra and Newport v. Fact Concerts, supra. In both cases, Monell liability was imposed (though in Fact Concerts punitive damages were not allowed).

the County Prosecutor's and Sheriff's order forcibly to enter third party premises to serve a capias, that order has all of the trappings of "official policy." In addition to the authority of the two officials who issued the order, see supra, this Court has recognized that the word 'policy' generally implies "a course of action consciously chosen from among various alternatives." Oklahoma City v. Tuttle, supra at 4643. That was certainly so here, where the authorities had many alternatives[9] and quite deliberately chose the most constitutionally problematic. They had a choice, they made it and that choice was the policy they established.

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[9] Since there was no suggestion of exigency, the Prosecutor could have, for example, sought a search warrant, or the deputies could have been ordered just to wait, or they could have investigated whether the witnesses were elsewhere.

Secondly, for purposes of Monell liability, a plaintiff's strongest case exists when there is "some affirmative link between the policy and the particular constitutional violation alleged." Tuttle, supra at 4643. And in this case, that link was as direct as in Monell, supra, Owen, supra, and every other case in which municipal liability has been sustained. Here, the Prosecutor's order to "go in and get them" was a statement of the policy, and it was the immediate (indeed, it was the only), cause of the constitutional violation physically perpetrated by the deputy sheriffs.

Unlike Tuttle, this is not a case where a single wrongful act of a low-level employee is cited merely to infer the existence of a government policy. In this case, the single wrongful act of the line police officers was authorized by senior-level officials who

established policy by their order forcibly to enter the petitioner's premises.

Furthermore, any different conclusion would lead to absurd results. For one thing, the government would then be entitled to one "free" constitutional violation, which certainly cannot be the law.

> "A rule that the city should be entitled to its first constitutional violation without incurring liability ... would be a legal anamoly, unsupported by the legislative history or policies underlying §1983." Tuttle, supra at 4645 (Brennan J., concurring).

It should also be noted that any such rule would, in effect, create a form of governmental immunity, at least for the first offense, such as was specifically rejected in Owen, supra.

The lower court decision also muddles the distinction between policy and custom. If the Prosecutor and Sheriff had ordered the break-in of petitioner's premises and then, not finding the witnesses there, had further

ordered two or three other break-ins that day, presumably the Sixth Circuit would have found the requisite policy. However the policy -- authorizing forcible entry to serve a capias -- would have been precisely the same at the time of the third forced entry as it was when the Prosecutor first ordered "go in and get them." What changed was that the third victim might be able to establish "custom" liability based just on the acts of the police officers, without even relying on the explicit policy choice of the Prosecutor.

Finally, the "single incident" rule adopted by the Court of Appeals undermines the dual purposes of §1983 liability against municipalities: compensation and deterrence.

B. The Compensatory and Deterrent Functions of §1983 Require Municipal Liability Under the Circumstances of this Case.

By enacting Section One of the Civil Rights Act of 1871, now codified as 42 U.S.C. §1983, Congress made those persons (now

recognized to include municipalities) who, under color of state law, violate a person's constitutional rights, liable for injuries resulting from the violation. History and precedent establish that the primary goals of §1983 are the compensation of the victims of unconstitutional action, and deterrence of like misconduct in the future. See Owen v. City of Independence, supra, Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Carey v. Piphus, 435 U.S. 247, 256-57 (1978). Any rule that would shield a municipality from §1983 liability for its unconstitutional actions, regardless of the municipality's causal responsibility for the injury incurred, would subvert the compensatory and

deterrent purposes of §1983.[10]

As the Court has emphasized in recent decisions, municipal liability plays a critical role in fulfilling the compensatory purpose of the statute. In Monell, 436 U.S. at 685 & n.45, the Court noted that statements by supporters of §1983 indicated Congress' intention to redress the unconstitutional misconduct of even municipalities by making those municipalities liable for compensatory damages. Later, in

[10] See J.O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 456 (1978) (goals of compensation and deterrence more frequently met if defendant is the government, not an individual); cf. Robertson v. Wegmann, 436 U.S. at 599 (Blackmun, J., dissenting) (objecting to a state survivorship law that abated a § 1983 claim where there was obvious unconstitutional misconduct because "[a]ny crabbed rule of survivorship obviously interferes directly with the second critical interest [deterrence] and may well interfere with the first [compensation]").

holding that a municipality does not enjoy qualified immunity under §1983 based on the good-faith actions of its officers, the Court emphasized that compensatory damages "[are] a vital component of any scheme for vindicating cherished constitutional guarantees." Owen v. City of Independence, supra at 651; see Carey v. Piphus, supra at 254-56 (§1983 damages should compensate persons for injuries caused by deprivation of constitutional rights); cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (in action for damages directly under Fourth Amendment, plaintiff is entitled to compensation); Butz v. Economou, 438 U.S. 478, 506 (1978) (in Bivens action, damages can be important means of vindicating constitutional guarantees). In both Monell and Owen, the compensatory purpose of §1983 served as a rationale for refusing to shield

municipalities from §1983 liability.

The importance of compensation for constitutional wrongs "is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Owen v. City of Independence, supra at 651. Local police should protect citizens against violent, lawless behavior, not subject them to it. When a municipality's official policy choice causes a deprivation of liberty or life without due process, albeit in a single incident, the victim of the municipality's unconstitutional misconduct should receive compensation.[11]

The ruling below effectively deprives plaintiffs of compensation, since the

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[11] In addition, a municipality is far less likely to be judgment-proof than is a city police officer.

individual officers have already been granted the benefit of a good faith immunity merely for following orders. And this Catch 22 dilemma is likely to recur in virtually every instance.[12]

Deterrence serves as the second essential purpose behind §1983. Owen v. City of Independence, supra; Newport v. Fact Concerts, Inc., supra at 268; Robertson v. Wegmann, supra at 590-91 (1978); Carey v. Piphus, supra, U.S. at 256-57; Imbler v.

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[12] Of course, the immunity of those officials does not preclude a claim against the responsible municipality. Owen, supra.

Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring in the judgment).[13] In explaining the deterrent rationale for holding that municipalities do not have qualified immunity under §1983, the Court in Owen stated:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Owen v. City of Independence, supra at 651-52 (footnotes and citation omitted). Cf. United States v. Johnson, 457 U.S. 537, 561 (1982) (retroactive application of decision upholding Fourth Amendment claim gives government incentive to err on side of constitutional behavior).

Furthermore, the deterrent role of a §1983 damages remedy in cases such as this has no current substitute. Los Angeles v. Lyons, 461 U.S. 95 (1983), effectively reduces the availability of injunctive relief under §1983 against unconstitutional police practices. Federal criminal prosecutions for violations of federal civil rights[14] are only sporadically used, cannot be privately enforced, and require a heavier burden of proof than that required in a civil action. And a municipality is free from the spectre of punitive damages for its constitutional

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[13] See also Carlson v. Green, 446 U.S. 14, 21 & n. 6 (1980) (Bivens remedy has deterrent as well as compensatory purpose, and § 1983 serves similar purposes). The legislative history of § 1983 contains numerous references to the intended deterrent effect of the statute. See Schnapper, Civil Rights Litigation After Monell, 79 Colum. L. Rev. 213, 244-45 & n. 174 (1979) (quoting seven Congressmen).

[14] E.g., 18 U.S.C. §§ 241, 242, & 245.

violations. Newport v. Fact Concerts, Inc., supra.

Individual defendants, insulated from damages by either an absolute[15] or a qualified immunity[16] are unlikely to be deterred by the spectre of a §1983 suit. To deny municipal liability as well for official decisions made by the highest authorities in the chain of command will entirely eliminate the incentive to minimize unconstitutional behavior. Cf. Marbury v. Madison, 1 Cranch 137, 163 (1803) ("The very essence of civil liberty certain consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties

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[15] E.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges).

[16] E.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (broadening "good-faith" immunity by allowing defendants to satisfy only an objective standard).

of government is to afford that protection.").

Lastly the §1983 damages remedy is based in part a theory of deterrence that, presupposes rational decisionmakers will take only those actions where benefits exceed costs. Thus, a damages remedy performs a deterrent function by forcing a party to consider the costs of certain action or inaction that would otherwise have been borne by some other party.

> Consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if at some point he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. Owen, supra at 656 (emphasis in original).

Under this view of deterrence, liability should be placed on the party best able to determine the true costs and benefits of a

given course of action and to effect a change in behavior based on that determination.[17] A damages remedy thus provides general deterrence against constitutional violations while respecting the values of federalism that favor the decisionmaking independence of local officials. Cf. Rizzo v. Goode, 423 U.S. 362 (1976).

[17] See Calabresi & Hirschoff, Toward a Test for Strict Liability in Tort, 81 Yale L.J. 1055, 1060 (1972).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Dated: August 1, 1985

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